

## **Rule 13, Ariz. R. Crim. P. – Joinder of offenses**

### **STATE’S MOTION TO CONSOLIDATE OFFENSES**

Consolidation of charges against a defendant is appropriate where the crimes are the same or similar character and evidence admitted in one trial would be admissible in the others.

The State of Arizona, by and through the undersigned deputy, pursuant to Rule 13.3, Arizona Rules of Criminal Procedure, moves this Court to consolidate the trial in Cause No. CR 95-02332 for trial with Cause No. CR 95-03684 and Cause No. CR 95-11742. The State requests consolidation because the offenses charged in all three cause numbers are of the same or similar character. In addition, the evidence in each case is admissible in the other for purposes of proving intent, plan, knowledge, and identity, as explained in the attached Memorandum of Points and Authorities. Defense counsel James Martin does not object to the consolidation of Cause Nos. CR 95-02332 and CR 95-03684. Defense counsel Robert Billar’s position is unknown until he has reviewed the police reports and spoken with James Martin. This motion is supported by the attached Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. FACTS:**

##### **A. Cause No. CR 95-02332:**

In this cause number, the defendant is charged with ten counts of child molestation, class 2 felonies; four counts of attempted child molestation, class 3 felonies; and one count of kidnapping, a class 2 felony. All of those offenses are dangerous crimes against children. The defendant is also charged with two counts of aggravated assault, class 6 felonies. The six charged victims are all boys whom the defendant taught at either Echo Mountain

Elementary School or Cactus View Elementary School. The defendant would tuck in the victims' shirts and touch their penises. He would also massage the boys' thighs, pinch or squeeze their chests, make the boys touch his bare chest, and put his knees on their buttocks. These acts occurred in the defendant's school office, on the playground, in the multi-purpose room, in the storage room, by the dumpsters, near the basketball court, and by the drinking fountain. The acts occurred during the playing of flag football and a game called "Capture the Flag."

**B. Cause No. CR 95-03684:**

In this cause number, the defendant is charged with twelve counts of child molestation, class 2 felonies, and eleven counts of attempted child molestation, class 3 felonies, all dangerous crimes against children. The nine charged victims are all boys whom the defendant taught at Echo Mountain Elementary School, Cactus View Elementary School, or the Paradise Valley Community Center Summer Program. The defendant would tuck in the victims' shirts and touch their penises. He would also rub the boys' thighs, pinch their chests, rub their stomachs, rub their chests, rub their buttocks, and have them sit on his lap. These acts occurred on the basketball court, on the baseball field, in the classroom, in the multi-purpose room, by the bathrooms, and in a grassy area. The acts occurred during the playing of kickball, soccer, flag football, and "Capture the Flag."

**C. Cause No. CR 95-11742:**

In this case, the defendant is charged with six counts of child molestation, class 2 felonies and dangerous crimes against children. The two charged victims are both boys who knew the defendant as a trusted family friend or as a counselor in the Paradise Valley Community Center Summer Program. The defendant touched both boys' penises.

## II. The Law:

Rule 13.3, Ariz. R. Crim. P., provides for joinder of offenses for trial as follows:

a. **Offenses.** Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:

- (1) Are of the same or similar character; or
- (2) Are based on the same conduct or are otherwise connected together in their commission; or
- (3) Are alleged to have been a part of a common scheme or plan.<sup>1</sup>

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c. Consolidation. If such offenses . . . are charged in separate proceedings, they may be joined in whole or in part by the court or upon motion of either party, provided that the ends of justice will not be defeated thereby.

### **A. Consolidation is proper when evidence relating to one charge is admissible in the trial on other charges:**

“Offenses may be joined as otherwise connected in their commission where, among other things, most of the evidence admissible in proof of one offense is also admissible in proof of the other.” *State v. Williams*, 183 Ariz. 368, 375, 904 P.2d 437, 444 (1995). Offenses are considered “otherwise connected together in their commission” when “the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps;” “where most of the evidence admissible in proof of one offense [is] also admissible in proof of the other;” or “where there [are] common elements of proof in the joined offenses.” *State v. Garland*, 191 Ariz. 213, 217, 953 P.2d 1266, 1270 (App. 1998), *quoting State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985).

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<sup>1</sup> The State does not allege here that the offenses were committed pursuant to a common scheme or plan. See *State v. Ives*, 187 Ariz. 102, 109, 927 P.2d 762, 769 (1996).

Under Rule 404(b), Arizona Rules of Evidence, evidence of other crimes, wrongs or acts is admissible for any relevant purpose, including to prove motive, intent, preparation, plan, knowledge, identity, absence of mistake, or to complete the story of the crimes. *State v. Mincey*, 141 Ariz. 425, 433, 687 P.2d 1180 (1984); *State v. VanAdams*, 194 Ariz. 408, 416, ¶ 20, 984 P.2d 16, 24 (1999); *State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987); *State v. Hanson*, 138 Ariz. 296, 302, 684 P.2d 850, 856 (App. 1983). Because evidence of the other crimes could have been admitted at a separate trial, a defendant would not be prejudiced by the joinder of the offenses, any more than he would have been if they had been tried separately.

If these matters were to be tried separately, the State would need to call the victims in Cause No. CR 95-02332 to testify as Rule 404(b) and/or Rule 404(c) witnesses in the trial involving the victims in Cause Nos. CR 95-03684 and CR 95-11742. Similarly, in the trial regarding the victims in Cause No. CR 95-03684, it would be necessary for the State to call the victims in Cause No. CR 95-02332 and the victims in Cause No. CR 95-11742 as Rule 404(b) and/or Rule 404(c) witnesses. Finally, in the trial regarding the victims in Cause No. CR 95-11742, the State would need to call the victims in Cause No. CR 95-03684 and the victims in Cause No. CR 95-02332 as Rule 404(b) and/or Rule 404(c) witnesses. The clear import of this testimony would prove the defendant's intent and knowledge, and also would tend to show that the defendant had an aberrant sexual propensity to molest young boys.

Additionally, the victims in each case referred to above could clearly be called in the trials on Cause Nos. CR 95-02332, CR 95-03684, and CR 95-11742, to show "lack of mistake" on the defendant's part. In view of the charges brought against the defendant in

each of these cause numbers, this evidence would also prove that the defendant knew that touching the young boys' penises was criminal. Since the same witnesses and evidence would be presented at separate trials, the cases should be consolidated for trial.

**B. Consolidation is proper to promote judicial economy:**

Any prejudice that the defendant claims he will suffer if these cases are consolidated for trial must be balanced against the countervailing considerations of judicial economy. *State v. Mauro*, 149 Ariz. 24, 27, 716 P.2d 393, 396 (1986), *reversed on other grounds*, 481 U.S. 520 (1987); *State v. Via*, 146 Ariz. 108, 115, 704 P.2d 238, 245 (1985). A defendant cannot resist consolidation simply on the ground that proof of guilt on one charge will make the trier of fact more likely to find guilt on the other charge. *Anderson v. State*, 155 Ariz. 289, 290, 746 P.2d 30, 31 (App. 1987). When multiple counts are tried together, “a defendant is not prejudiced if the jury is (1) instructed to consider each offense separately, and (2) is advised that each offense must be proven beyond a reasonable doubt.” *State v. Atwood*, 171 Ariz. 576, 630, 832 P.2d 593, 647 (1992) (disapproved on other grounds by *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001)). Accord, *State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990); *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985), *State v. Lee*, 189 Ariz. 590, 600, 944 P.2d 1204, 1214 (1997). As the Arizona Supreme Court stated in the context of jointly trying defendants, “Although there is some possibility of confusion in a joint trial, in the interest of judicial economy, joint trials are the rule rather than the exception.” *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *see also State v. VanWinkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996).

Based on the foregoing arguments, it is abundantly clear that the three separate trials presently set will require the exact same rendition of evidence and will needlessly

expend judicial resources as well as the parties' resources. Therefore, the State asks this Court to consolidate the three cause numbers for one trial.

**CONCLUSION:**

In the present case, consolidation of the charges against the defendant is appropriate pursuant to Rule 13.3(c), Arizona Rules of Criminal Procedure. The crimes are of the same or similar character. Evidence of the crimes in the one case would be admissible in a trial on the crimes in the other cases pursuant to Rule 404(b), Arizona Rules of Evidence. The considerations of judicial economy also support consolidation. For all of the above reasons, this Court should consolidate the charges against the defendant.